

Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

APEXART CURATORIAL PROGRAM,  
INC.,

Plaintiff,

v.

BAYSIDE ROLLERS LLC, ABIGAIL  
CARSWELL, BAYSIDE HOSPITALITY  
LLC, a Washington Limited Liability  
Company, and AMERICAN URBAN  
ART AND GRAFFITI CONSERVATION  
PROJECT, a Washington Non-Profit  
Corporation,

Defendants.

CASE NO.  
2:22-cv-00786-TLF

**DEFENDANTS' ANSWER AND  
AFFIRMATIVE DEFENSES**

Defendants Bayside Hospitality and American Urban Art and Graffiti Conservation  
Project answer, and other Defendants amend their Answer as follows:

I. ANSWER

1. The Defendants deny.

DEFENDANTS' ANSWER AND  
AFFIRMATIVE DEFENSES - Page 1

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1           2.    The Defendants lack sufficient knowledge or information to admit or deny  
2                   how the Plaintiff is incorporated, and therefore deny the same but otherwise  
3                   admit the Plaintiff has a place of business at 291 Church Street, New York,  
4                   New York 10013.

5  
6           3.    The Defendants admit.

7           4.    The Defendants admit.

8           5.    The Defendants admit.

9  
10          6.    The Defendants admit.

11          7.    The Defendants admit.

12  
13          8.    Paragraph 8 contains a statement of law and not an allegation but to the  
14               extent it contains an allegation, Defendants deny.

15          9.    Paragraph 9 contains a statement of law and not an allegation but to the  
16               extent it contains an allegation, Defendants deny.

17  
18          10.   Paragraph 10 contains a statement of law and not an allegation but to the  
19               extent it contains an allegation, Defendants deny.

20          11.   Paragraph 11 contains a statement of law and not an allegation but to the  
21               extent it contains an allegation, Defendants deny.

22  
23          A.    The Defendants deny.

24  
25          DEFENDANTS' ANSWER AND  
26          AFFIRMATIVE DEFENSES - Page 2

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27

12. The Defendants admit.

13. The Defendants lack sufficient knowledge or information to admit or deny and therefore, deny the allegations in paragraph 13.

14. The Defendants lack sufficient knowledge or information to admit or deny and therefore, deny the allegations in paragraph 14. Answering further, the Defendants deny that Apexart is known worldwide in the art community for offering opportunities to curators and emerging and established artists who challenge set ideas about culture, art, exhibitions, and curations, and the defendants lack sufficient knowledge or information to admit or deny the rest of paragraph 14 and therefore, deny the allegations in paragraph 14.

15. The Defendants lack sufficient knowledge or information to admit or deny and therefore, deny the allegations in paragraph 15.

16. The Defendants admit this allegation based upon discovery.

17. The Defendants lack sufficient knowledge or information to admit or deny and therefore, deny the allegations in paragraph 17.

18. The Defendants lack sufficient knowledge or information to admit or deny and therefore, deny the allegations in paragraph 18.

19. The Defendants lack sufficient knowledge or information to admit or deny and therefore, deny the allegations in paragraph 19.

20. The Defendants admit.

21. The Defendants admit.

22. The Defendants admit.

23. Paragraph 23 contains a statement of law and not an allegation but to the extent it contains an allegation, Defendants deny.

24. The Defendants deny.

25. The Defendants lack sufficient knowledge or information to admit or deny and therefore, deny the allegations in paragraph 25.

26. The Defendants deny that the Apex Art and Culture Center is expected to be an “art exhibition” space and admit the rest of paragraph 26.

27. The Defendants admit.

28. The Defendants admit.

29. The Defendants admit.

30. The Defendants admit.

31. The Defendants admit.

32. The Defendants admit.

33. The Defendants admit.

34. The Defendants admit.

DEFENDANTS’ ANSWER AND  
AFFIRMATIVE DEFENSES - Page 4

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1 35. The Defendants admit.

2 36. The Defendants admit.

3  
4 37. The Defendants lack sufficient knowledge or information to admit or deny  
5 and therefore, deny the allegations in paragraph 37.

6 38. The Defendants deny.

7  
8 39. The Defendants admit only that the letter in Exhibit D or a letter  
9 substantially similar in form was sent to [babyg@thedogtowncollection.com](mailto:babyg@thedogtowncollection.com)  
10 and was forwarded to John Carswell. The balance of the allegations are  
11 denied.

12 40. The Defendants admit.

13  
14 41. The Defendants admit that Abigail Carswell filed or caused to be filed an  
15 initial application with the USPTO in the form in Exhibit E or substantially  
16 similar on the date indicated. The balance of the allegations are denied. The  
17 Application Ser. No. 97464041 at the USPTO was abandoned on or about  
18 October 11, 2023. Abigail Carswell filed a different application with the  
19 USPTO under Ser. No. 98143306 on or about August 21, 2023 by and  
20 through Kyle Straughn of Karr Tuttle Campbell, Seattle, Washington.

21  
22 42. The Defendants admit.

1 43. The Defendants admit this is the language of the abandoned Application Ser.  
2 No. 97464041.

3 44. The Defendants admit this was the event flyer associated with the abandoned  
4 Application Ser. No. 97464041.

5 45. The Defendants admit with regard to the abandoned Application Ser. No.  
6 97464041.

7 46. The Defendants admit with regard to the abandoned Application Ser. No.  
8 97464041.

9 47. The Defendants admit.

10 48. The Defendants admit except they are without sufficient knowledge or  
11 information of when the Plaintiff learned of the Defendants' now abandoned  
12 Application Ser. No. 97464041.

13 49. The Defendants deny.

14 50. The Defendants deny.

15 51. Paragraph 51 contains a statement of law and not an allegation but to the  
16 extent it contains an allegation, Defendants deny.

17 52. The Defendants deny.

18 53. The Defendants deny.

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25 DEFENDANTS' ANSWER AND  
26 AFFIRMATIVE DEFENSES - Page 6  
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1 54. The Defendants admit they decided to protect their own mark and use in part  
2 because of the letter from Duane Morris in Exhibit D. The allegations are  
3 denied to the extent Plaintiff alleges them to show culpability.  
4

5 55. The Defendants deny.

6 56. The Defendants deny.

7 57. The Defendants deny.

8 58. The Defendants deny.

9 59. The Defendants deny.

10 60. The Defendants deny.

11 61. The Defendants deny.

12 62. In answering Paragraph 62, Defendants repeat, reallege, and incorporate by  
13 reference their previous answers, and to the extent Paragraph 62, contains a  
14 statement of law and not an allegation but to the extent it contains an  
15 allegation, Defendants deny.  
16

17 63. The Defendants deny.

18 64. The Defendants deny.

19 65. The Defendants deny.

20 66. The Defendants deny.  
21  
22  
23  
24

1 67. The Defendants deny.

2 68. The Defendants deny.

3 69. The Defendants deny.

4 70. The Defendants deny.

5 71. In answering Paragraph 71, Defendants repeat, reallege, and incorporate by  
6 reference their previous answers, and to the extent Paragraph 71, contains a  
7 statement of law and not an allegation but to the extent it contains an  
8 allegation, Defendants deny.

9 72. The Defendants deny.

10 73. The Defendants deny.

11 74. The Defendants deny.

12 75. The Defendants deny.

13 76. The Defendants deny.

14 77. In answering Paragraph 77, Defendants repeat, reallege, and incorporate by  
15 reference their previous answers, and to the extent Paragraph 77 contains a  
16 statement of law and not an allegation but to the extent it contains an  
17 allegation, Defendants deny.

18 78. The Defendants deny.

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25 DEFENDANTS' ANSWER AND  
26 AFFIRMATIVE DEFENSES - Page 8

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1 79. The Defendants deny.

2 80. The Defendants deny.

3 81. The Defendants deny.

4  
5 82. In answering Paragraph 82, Defendants repeat, reallege, and incorporate by  
6 reference their previous answers, and to the extent Paragraph 82 contains a  
7 statement of law and not an allegation but to the extent it contains an  
8 allegation, Defendants deny.  
9

10 83. The Defendants deny.

11 84. The Defendants deny.

12 85. The Defendants deny.

13 86. The Defendants deny.

14 87. The Defendants deny.

15 88. The Defendants deny.

16  
17  
18 PRAYER FOR RELIEF

19  
20 1. The Defendants deny.

21 2. The Defendants deny.

22 3. The Defendants deny.

23 4. The Defendants deny.

24  
25 DEFENDANTS' ANSWER AND  
26 AFFIRMATIVE DEFENSES - Page 9

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1 4(a)-(f). The Defendants deny.

2 5. The Defendants deny.

3 6. The Defendants deny.

4 7. The Defendants deny.

5 8. The Defendants deny.

6 9. The Defendants deny.

7 10. The Defendants deny.

8 11. The Defendants deny.

9 12. The Defendants deny.

10 13. The Defendants deny.

11 14. The Defendants deny.

12 15. The Defendants deny.

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18 II. AFFIRMATIVE DEFENSES

19 HAVING ANSWERED Plaintiff's Complaint, Defendants now assert the following  
20 affirmative defenses:

21  
22 FIRST AFFIRMATIVE DEFENSE

23 Classic Descriptive Fair Use 15 U.S.C. § 1115(b)(4)

24  
25 DEFENDANTS' ANSWER AND  
26 AFFIRMATIVE DEFENSES - Page 10

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To the extent that the Plaintiff asserts the phrase “Apex Art” is their trademark and  
can prove that “Apex Art” is their trademark:

1. In the alternative, Defendants do not use the alleged mark as a trademark or service mark.
2. Defendants use the alleged mark fairly and in good faith.
3. In the alternative, Defendants use the alleged mark only to describe their entertainment center/venue and its aesthetic.

## SECOND AFFIRMATIVE DEFENSE

### Artistic Expression

1. In the alternative, the alleged mark is artistically relevant to the unique aesthetic of the entertainment center/venue.
2. In the alternative, the mark does not explicitly mislead consumers as to the source of the work of the unique aesthetic of the entertainment center/venue.

## THIRD AFFIRMATIVE DEFENSE

### Failure to Exhaust Administrative Remedies

1. To the extent Plaintiff claims registration of the mark is an act of infringement:

2. Plaintiff has not exhausted the prescribed administrative remedy of protesting the application allowing use of the mark because the application and decisions are still pending.

#### FOURTH AFFIRMATIVE DEFENSE

##### Reasonableness RCW § 19.86.920

1. Defendants' business practices are reasonable in relation to the development and preservation of the business
2. Defendants' business practices are not injurious to the public interest.

#### FIFTH AFFIRMATIVE DEFENSE

##### Act Permitted by Regulatory Body RCW § 19.86.170

1. Defendants' use of the mark is permitted under Federal Trademark Law.

#### SIXTH AFFIRMATIVE DEFENSE

##### Tea Rose-Rectanus Doctrine/Good Faith Junior User

1. To the extent the alleged mark is unregistered, or Plaintiff asserts an unregistered mark claim:
2. Defendants' first use of the mark was in good faith to describe the unique aesthetic of the entertainment center/venue without knowledge of Plaintiff's use of the mark.

3. Defendants' first use of the mark was in a remote area across the country compared to Plaintiff's territory.

4. Adoption of the mark would not confuse or mislead the public.

WHEREFORE, Defendants BAYSIDE HOSPITALITY and AMERICAN URBAN ART AND GRAFFITI CONSERVATION PROJECT, having answered Plaintiff's Complaint and having asserted affirmative defenses, now prays that the court:

1. Award Defendants reasonable attorney's fees and legal costs pursuant to statute and/or equitable bases including but not limited to Mutuality of Remedy and 15 U.S.C. § 1117.

2. Award Defendants statutory costs and fees.

3. Award such other and further relief as the court deems just and equitable in the premises.

DATED this 27<sup>th</sup> Day of November 2023.

OJALA LAW INC., P.S.

/s/ Peter C. Ojala

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DEFENDANTS' ANSWER AND  
AFFIRMATIVE DEFENSES - Page 13

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